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SEPTEMBER ~~13~~, 14, 2011

# RECOMMENDATIONS REGARDING THE MAINE HEALTH BENEFIT EXCHANGE

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Report to the Governor and the Joint Standing  
Committee on Insurance and Financial Services

From the Advisory Committee on Maine's Health  
Insurance Exchange

September \_\_, 2011

## I. Background

The 125th Maine State Legislature adopted a Resolve to establish the Advisory Committee on Maine's Health Insurance Exchange (the "Advisory Committee") "to develop and provide recommendations, including suggested enabling legislation, to the Governor and the Legislation for a health insurance exchange."<sup>1</sup> Specifically, the Resolve required the Advisory Committee to:

1. Review and consider the recommendations issued by the ~~125~~<sup>124</sup>~~th~~<sup>th</sup> ~~Legislature's~~ Joint Select Committee on Health Care Reform with respect to a health insurance exchange;
2. Consider the rules issued by the Federal Government subsequent to the passage of the Patient Protection and Affordable Care Act and their impact on the creation and operations of a health insurance exchange;
3. Review the work products of other states to consider whether any elements of their health insurance exchanges can be used in implementing Maine's health insurance exchange;
4. Establish technical committees or seek the advice of technical experts when necessary to execute the Advisory Committee's duties; and
5. Seek input from and report regularly to legislative leadership, the Joint Standing Committee on Insurance and Financial Services, and the Governor's office throughout the Advisory Committee's deliberations.

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<sup>1</sup> Resolve Chapter 105, LD 1582, 125th Maine State Legislature.

## **II. Advisory Committee Members**

In July 2011, the Governor appointed the members of the Advisory Committee in accordance with the nominating process and composition required in the Resolve.

The members of the Advisory Committee are:

- Joel Allumbaugh  
CEO, National Worksite Benefit Group, Inc.
- Dan Bernier  
The Law Office of Daniel Bernier
- Jamie Bissonette Lewey  
Chair, Maine Indian Tribal State Commission
- Joseph Bruno (Chair of Advisory Committee)  
Chair, Dirigo Health Agency Board of Trustees
- David R. Clough  
Maine State Director, NFIB
- Edward Kane  
Vice President for Maine, Harvard Pilgrim Health Care
- Dan McCormack  
CEO, Intermed
- Steve Michaud  
President, Maine Hospital Association
- Kristine Ossenfort, Esq.,  
Director of Government Relations, Anthem Blue Cross Blue Shield

### III. Issues Considered by the Advisory Committee

In meetings of the Advisory ~~committee~~Committee conducted in public in accordance with Section 5 of the Resolve on August 16th and 23rd and September 8th the Advisory Committee considered 31 items that must be decided by the State in establishing a health insurance exchange in accordance with the Patient Protection and Affordable Care Act (“ACA”) (an “Exchange”).

These 31 items were based on questions presented by the National Association of Insurance Commissioners in its American Health Benefit Exchange Model Act (the “NAIC Model Act”) for states to consider in establishing an exchange and drafting its enabling legislation for an exchange.<sup>2</sup>

For each item, the Advisory Committee considered any relevant narrative included within each of the two bills establishing a health insurance exchange that were introduced during the 125th Legislative session-- HP 1098, LD 1497 and HP 1099, LD 1498-- in addition to any applicable recommendations in the final report by the 125th Legislature’s Joint Select Committee on Health Care Reform Opportunities and Implementation (the “JSC Report”), and the proposed regulations issued by the Federal Government subsequent to the passage of ACA. In addition, for certain issues the Advisory Committee considered testimony by appropriate experts. For example, for issues relating to the structure of the Exchange, the Advisory Committee considered testimony by Linda Pistner, Chief Deputy Attorney General, and for issues relating to the effect of ACA’s changes on Maine’s insurance markets, the Advisory Committee considered testimony and actuarial analysis provided by Gorman Actuarial, LLC.

The items considered by the Advisory Committee appear in the Appendix A to this report.

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<sup>2</sup> The NAIC Model Act is available at [http://www.naic.org/documents/committees\\_b\\_exchanges\\_adopted\\_health\\_benefit\\_exchanges.pdf](http://www.naic.org/documents/committees_b_exchanges_adopted_health_benefit_exchanges.pdf) (November 22, 2010)

## IV. Advisory Committee Recommendations

The Advisory Committee's recommendations on the items that it has considered in establishing an Exchange appear in Appendix A to this report. This section includes a summary of these recommendations. The Advisory Committee's recommendations cover both language for suggested legislation establishing the Exchange which is attached as Appendix B to this report, as well as additional recommendations for the Legislature to consider when crafting the Exchange legislation. Accordingly, this summary is organized into two parts: Part A summarizes the recommendations that are reflected in the suggested legislation and Part B summarizes the additional recommendations by the Advisory Committee (purposefully not reflected in the suggested legislation) for the Legislature to consider during the drafting process.

### A. *Recommendations Reflected in Suggested Legislation*

The following recommendations are reflected in the Advisory Committee's suggested legislation for establishing the Exchange, which is attached to this report as Appendix B.

1. Exchange Structure: The Legislature should establish the Exchange as a state agency [within the Department of Professional and Financial Regulation](#).

The ACA requires the Exchange to be structured as either a governmental agency or a non-profit entity.<sup>3</sup> If structured as a governmental agency, ACA permits the Exchange to be established as part of an existing executive branch agency or an independent public agency.<sup>4</sup> The Advisory Committee recommends that the Legislature structure the Exchange as a governmental agency for three reasons:

- First, ACA requires an Exchange to perform several regulatory functions that affect the welfare of Maine's citizens, including the power to determine an individual's eligibility to purchase coverage through the Exchange and to determine whether a health insurance issuer or health plan meets minimum requirements to be offered on the Exchange.<sup>5</sup>
- Second, the Exchange must coordinate closely with both the State Bureau of Insurance and the Department of Health and Human Services. The coordination is likely to be more efficient and effective if the Exchange also operates as a state agency.
- Third, ACA requires the Exchange to be financially self-sustaining by 2015 such that the Exchange will need both governmental authority and oversight in imposing fees or other revenue-raising measures and in spending these revenues.<sup>6</sup>

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<sup>3</sup> ACA § 1311(d)(1).

<sup>4</sup> 76 *Fed. Reg.* 41866, 41870 (July 15, 2011).

<sup>5</sup> ACA § 1311(d)(4).

<sup>6</sup> ACA § 1311(d)(5)(A).

The regulatory functions that ACA requires an Exchange to perform, including the power to collect fees, are inherently governmental functions that a non-profit entity may not be able to perform if it wishes to have tax-exempt status under the federal Internal Revenue Code. In reaching this recommendation, the Advisory Committee took into account recommendations by the Governor, recommendations in the JSC Report, and testimony by Linda Pistner, Chief Deputy Attorney General.

The Advisory Committee also considered the differences between establishing the Exchange as a pure state agency within the executive branch or as a quasi-governmental agency. Ms. Pistner testified before the Advisory Committee on August 23, 2011, and explained that, in contrast to a state agency, a quasi-governmental agency is generally not financially supported by the full faith and credit of the state and the officers and directors of the agency, while typically appointed by the Governor, serve for a specified term and are not subject to removal except for cause. Ms. Pistner also testified that an agency governed by a board is typically a quasi-governmental agency. She explained that it was uncommon to establish a governmental agency governed by an independent board, and that such a structure could raise issues of improper ex parte communication between board members and the officers and directors of the agency. However, she identified other instances in Maine where a governmental agency was governed by an independent board operating within a larger department.

~~{The Advisory Committee recommends that the Exchange be **governed by an independent board but operate as a governmental agency**<sup>7</sup> housed within the Department of Professional and Financial Regulation. Some of the functions related to the Exchange, including determining whether issuers and health plans meet certain licensing requirements, will need to be performed by the Bureau of Insurance in order to ensure that issuers and plans remain subject to consistent licensing requirements regardless of whether they are offered through the Exchange. Moreover, the Bureau of Insurance will play an important role in helping the Exchange to establish standards for “navigators” who will be responsible for creating public awareness of the Exchange and assisting individuals in enrolling in qualified health plans in the Exchange. Currently, the Commissioner of Professional and Financial Regulation oversees the Bureau of Insurance, the Bureau of Financial Institutions, and other similar agencies and coordinates efforts among these agencies when necessary. Because of the shared responsibilities between the Bureau of Insurance and the Exchange, the Advisory Committee recommends that the Exchange be housed within the Department of Professional and Financial Regulation so that the Commissioner can oversee and coordinate any shared responsibilities between the two agencies.}~~~~[To be discussed on September 14, 2011]~~

2. Exchange Governance: ~~[Sections (a), (b), and (c) to be discussed on September 14, 2011]~~

a) The Exchange should be governed by an Executive Director and a commission.

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<sup>7</sup>~~The Advisory Committee is seeking additional guidance from Ms Pistner regarding the question of an independent governmental agency versus a quasi-governmental agency. Once that information is available, it will be included within the Committee’s final report.~~

The commission would advise the Executive Director and the Commissioner of Professional and Financial Regulation regarding issues related to the administration and operation of the Exchange. In addition, the commission would have some governing powers. The Advisory Committee's suggested legislation does not include recommendations regarding the allocation of governing powers between the Executive Director and the commission. The Advisory Committee recommends that the Legislature determine the allocation of these powers and, in making such determination, consider existing state models for shared governance, such as the State Liquor and Lottery Commission.

- b) The Executive Director should be appointed by the Governor, subject to confirmation by the Legislature. The Executive Director should serve at the pleasure of the Governor.

The Advisory Committee recommends that the legislation establishing the Exchange permit the Exchange commission to recommend candidates for Executive Director to the Commissioner of Professional and Financial Regulation and to the Governor. The Executive Director should be appointed by the Governor subject to confirmation by the Legislature and should serve at the pleasure of the Governor.

- c) ~~a)-The Exchange should be governed by a board.~~ The members of the board commission should be appointed by the Governor, subject to confirmation by the Legislature.

The Advisory Committee ~~observed that one of the principle advantages of a quasi-governmental agency is the stability that would be provided by a governing board whose members turn over at fixed intervals rather than with a change in Governor. Accordingly, the Advisory Committee recommends that the Exchange be governed by a board,~~ recommends that the voting members of ~~which are~~ the commission be appointed by the Governor and subject to confirmation by the Legislature. Moreover, the Advisory Committee recommends that the Legislature adopt legislation establishing the Exchange promptly so that members of the board commission can be appointed by the Governor no later than October 2012.

The Advisory Committee ~~observed that one of the principal advantages of a quasi-governmental agency is the stability that would be provided by a governing board whose members turn over at fixed intervals rather than with a change in Governor. Accordingly, the Advisory Committee~~ recommends that the enabling legislation provide for the voting members of the commission to serve three-year terms, but no more than two consecutive terms. The initial terms of the voting members should be staggered to provide continuity in governance as members' terms expire and they are replaced.

- d) ~~b)-The members of the board commission~~ should represent stakeholders to the Exchange and meet certain qualification requirements.

The Advisory Committee considered the federal proposed regulations, which require the governing board of an exchange to represent consumer interests by ensuring that the majority of the voting members do not have a conflict of interest and that a majority of the voting members have

relevant experience in the health insurance or health care delivery industry. Under proposed federal rules, a voting member has a conflict of interest if he or she is a representative of a health insurance issuer, health insurance producer, or is licensed to sell health insurance.<sup>87</sup> Because the commission will have some governing powers, the Advisory Committee recommends that the composition of the commission be consistent with the federal proposed regulations. The Advisory Committee recommends that the ~~board~~commission consist of eleven members in order to remain a manageable size. Nine of the members will have voting rights and be appointed by the Governor subject to confirmation by the Legislature. These voting members will represent stakeholders to the Exchange as follows:

- one member representing insurers,
- one member representing health insurance producers,
- one member representing healthcare providers,
- one member representing ~~large employers~~<sup>9</sup> employers that employed an average of not more than 50 employees during the calendar year preceding the member's appointment,
- one member representing ~~small~~ employers that employed an average of not less than 51 employees and not more than 100 employees during the calendar year preceding the member's appointment,
- one member representing consumers,
- one member representing federally recognized Indian tribes in the State, and
- two additional members, who may be drawn from any of the above categories, or any other category.

In order to satisfy federal requirements, the voting members must have relevant experience in the following areas: health benefits administration, health care finance, health plan purchasing, health care delivery system administration, public health, or health policy issues related to the small group and individual markets and the uninsured. The Advisory Committee recommends that these requirements be included in the state legislation.

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<sup>87</sup> Prop. 45 C.F.R. § 155.110(c)(3).

<sup>9</sup> ~~The Advisory Committee recommends that a large employer be defined to mean an employer that employs an average of 51 to 100 employees during a calendar year, provided that in 2016, a large employer will mean an employer who employs an average of more than 100 employees during a calendar year. The change to the definition of large employer is necessary because beginning in 2016 "small employer" for the small group market will be defined to include employers who employ an average of 51 to 100 employees during a calendar year. [The suggested legislation permits an individual who satisfies the requirements for representing a large employer or a small employer to complete his or her term if the definition of a large employer changes during his or her term.]~~



The Advisory Committee recommends that the Governor appoint the Chair of the **Board**commission.

The Advisory Committee also recommends that the **board**commission include two ex-officio members: the Commissioner of the Department of Professional and Financial Regulation and the Commissioner of the Department of Health and Human Services or their designees. Many of the functions performed by the Exchange will require input and resources of both the Department of Health and Human Services and the Department of Professional and Financial Regulation. Accordingly, the Advisory Committee thought it important for the **board**commission to receive input from these agencies in its decision-making process.

e) ~~e)~~ The enabling legislation should permit the Exchange to establish advisory committees who represent stakeholder interests.

The ACA requires the Exchange to regularly consult with stakeholders.<sup>108</sup> Under the statute, stakeholders may include educated health care consumers, individuals and entities with experience in facilitating enrollment in health coverage, advocates for enrolling hard to reach populations, small businesses and self-employed individuals, state Medicaid and CHIP agencies, federally-recognized tribes, public health experts, health care providers, large employers, health insurance issuers, and agents and brokers.<sup>119</sup>

Although some of these stakeholders will be represented on the **board**commission, their representation is limited to one member and not all of the categories of stakeholders are represented. Accordingly, the Advisory Committee proposes that the enabling legislation allow the Exchange to establish advisory committees representing the various stakeholders to advise the Exchange on issues of importance to these stakeholders.

Moreover, the proposed rules and existing state and federal Executive Orders require the Exchange to seek input from all federally-recognized tribal organizations within the State.<sup>1210</sup> Accordingly, the Advisory Committee recommends that the enabling legislation require the Exchange to establish an advisory committee that includes representatives who are appointed by the chief and council for each of the federally-recognized tribes within the State.

3. Duties of Exchange: The enabling legislation should require the Exchange to perform only the duties required by ACA with some state-specific clarifications.

The ACA requires the Exchange to perform approximately twenty duties, including certification of qualified health plans to participate on the Exchange, determining eligibility of individuals to

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<sup>108</sup> ACA § 1311(d)(6); Proposed 45 C.F.R. § 155.130.

<sup>119</sup> *Id.*

<sup>1210</sup> 76 Fed. Reg. at 41873; *Consultation and Coordination with Federal Indian Tribes* U.S. Executive Order 1375 (Nov. 6, 2000); *An Order Recognizing the Special Relationship Between the State of Maine and the Sovereign Native American Tribes Located Within the State of Maine* (Aug. 26, 2011).

participate in the Exchange, and maintaining toll-free hotlines and other services to assist individuals in purchasing coverage on the Exchange.<sup>1311</sup> The Advisory Committee recommends that the enabling statute include the duties that the Exchange is required to perform as described in the NAIC Model Act with the following modifications to reflect existing requirements under Maine statutes:

- The Exchange is required by federal law to establish a navigator program to raise awareness of the Exchange, facilitate enrollment in qualified health plans, and perform other customer service-oriented functions.<sup>1412</sup> To protect consumers, the Advisory Committee recommends that navigators be required to meet any registration or licensing requirements established by the Bureau of Insurance in consultation with the Exchange and the Department of Health and Human Services. While the Advisory Committee was of the view that navigators must be adequately trained, the Committee did not recommend that the legislation specify a training component for registration or licensure, leaving this to the discretion of the Bureau of Insurance and the Exchange.
- The Advisory Committee recommends that the enabling legislation require the Exchange to allow health insurance producers to enroll individuals and employers in qualified health plans. Insurance producers play an important role in assisting small employers with the purchase of small group health insurance for their employees. To increase the likelihood that small employers will participate in the Exchange, it is important for insurance producers with whom small employers already have professional relationships to be permitted to assist these employers in obtaining coverage for their employees through the Exchange.
- The ACA requires the Exchange to allow employers to select a level of coverage (*e.g.*, bronze, silver, gold or platinum) from which employees may select a qualified health plan in which to enroll.<sup>1513</sup> However, federal proposed regulations permit an Exchange to allow employers to make other choices, such as selecting specific plans in which employees may enroll.<sup>1614</sup> The Advisory Committee recommends allowing the Exchange to determine whether to make additional choices available to employers and that the Exchange not preclude an employer from choosing one qualified health plan.

Moreover, in performing its duty to certify qualified health issuers and health plans to participate in the Exchange, the Advisory Committee recommends that if an issuer or plan meets licensing or other minimum requirements established by the Exchange (in order to meet federal requirements) or the Superintendent of the Bureau of Insurance (as applicable) the issuer or plan will be

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<sup>1311</sup> ACA § 1311(c). One of these duties includes establishing a Small Business Help Options Program (also referred to as a SHOP Exchange) to assist small employers in enrolling their employees in qualified health plans offered to their employees through the Exchange. Therefore, the Exchange will serve not only individuals but also, through the SHOP program, small employers.

<sup>1412</sup> ACA § 1311(d)(4)(K).

<sup>1513</sup> ACA § 1312(a)(2).

<sup>1614</sup> Proposed 45 C.F.R. § 705(b)(2).

eligible to participate in the Exchange. In other words, the Advisory Committee also recommends that all qualified plans be eligible to participate on the Exchange, so that the Exchange functions as an open marketplace. The Advisory Committee recommends against permitting the Exchange to require an issuer or plan to meet requirements to participate in the Exchange that are not required under federal law or by the Superintendent of the Bureau of Insurance.

4. Exchange Funding: The Exchange ~~board~~ should be required to submit a budget for approval to the Commissioner of the Department of Professional and Financial Regulation and any assessments or fees charged by the Exchange to raise revenue must be subject to Legislative approval.

The ACA requires the Exchange to be self-sustaining by 2015 and permits the Exchange to charge assessments or user fees to health carriers or adopt other measures to generate funding to support its operations.<sup>1715</sup> The Advisory Committee recommends including a provision in the legislation that requires (1) the Exchange ~~board~~ to submit a budget for approval to the Commissioner of the Department of Professional and Financial Regulation and (2) the initial budget to include recommendations for the Exchange to be self-sustaining by 2015. In addition, the enabling legislation should provide that any revenue-raising initiatives that will be undertaken by the Exchange must be enacted by the Legislature.<sup>1816</sup>

The Advisory Committee also recommends that the State include in its application to the Federal Government for an Exchange establishment grant a request for funds that the State may use to engage qualified consultants to analyze and make recommendations to the State regarding how the Exchange can generate sufficient revenue to be self-sustaining by 2015.

The suggested legislation proposed by the Advisory Committee includes the NAIC Model Act provisions that permit the Exchange to impose assessments or user fees on health carriers. The Advisory Committee heard testimony from the public expressing concern that these provisions would permit the Exchange to charge assessments or user fees to health carriers that do not (1) offer health benefit plans inside or outside of the Exchange (such as carriers offering only disability, life, and long-term care insurance) and/or (2) offer any health benefit plans in the Exchange. If the Legislature wishes to limit the Exchange's ability to assess user fees on health carriers that either do not offer health benefit plans or do not offer health benefit plans in the Exchange, the funding provisions of the suggested legislation must be revised accordingly.

5. Automatic Repeal: If the U.S. Supreme Court overturns all or part of the ACA, the Exchange ~~board~~ should be required to recommend to the Legislature whether to continue the Exchange.

The ACA's "individual mandate" to purchase health insurance coverage and the expansion of Medicaid have been subject to legal challenges in federal courts. In June, the U.S. Court of Appeals for

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<sup>1715</sup> ACA § 1311(d)(5)(A).

<sup>1816</sup> 5 MRSA §§ 8071 and 8072.

the Sixth Circuit upheld the constitutionality of the individual mandate and in August, the U.S. Court of Appeals for the Eleventh Circuit declared the individual mandate unconstitutional.<sup>1917</sup> It is expected that the U.S. Supreme Court will rule on the constitutionality of these provisions of ACA in order to resolve the circuit split; however, this ruling may not occur for another year or two.

Accordingly, the Advisory Committee recommends that the enabling legislation provide that if the U.S. Supreme Court overturns all or part of ACA, or if ACA is otherwise repealed (in whole or in part), the Exchange ~~board~~ will be required to recommend to the Legislature and the Governor, within 60 days of the Supreme Court decision, whether to continue the Exchange.

***B. Additional Recommendations for Legislature to Consider***

The Advisory Committee also makes the following recommendations related to establishing an Exchange that are not reflected in the suggested enabling legislation.

1. The Advisory Committee recommends against merging the risk pools for the individual and small group insurance markets.

Beginning in 2014, ACA requires all enrollees in all health plans (other than grandfathered health plans) offered by a health insurance issuer in the individual market both inside and outside of the Exchange to be members of a single risk pool.<sup>2018</sup> Likewise, all enrollees in health plans offered by an issuer in the small group market (other than grandfathered plans) must be members of a single risk pool.<sup>2119</sup> The ACA permits a state to merge the individual and small group insurance markets within a state if the state determines that the merger is appropriate.<sup>2220</sup>

The Advisory Committee considered a report prepared by Gorman Actuarial, LLC for the Maine Bureau of Insurance and testimony by Bela Gorman to the Advisory Committee on August 23, 2011, that merging the individual and small group insurance markets will cause small group insurance premiums to increase and this increase, in turn, will subsidize a decrease in insurance premiums in the individual insurance market.<sup>2321</sup> The original Gorman study, completed before recent changes in State law, including the State's recently enacted reinsurance program<sup>2422</sup> which is designed to limit increases in premiums in the individual insurance market, is being updated and will be available to the Legislature for their deliberations in 2012.

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<sup>1917</sup> Thomas More Law Center et al. v. Barrack Hussein Obama et al. (Sixth Circuit, Case No. 10-2388, (June 29, 2011) at <http://www.ca6.uscourts.gov/opinions.pdf/11a0168p-06.pdf>; Florida v. HHS, 11th Cir., No. 11-11021, (August 12, 2011) at <http://www.uscourts.gov/uscourts/courts/ca11/201111021.pdf>.

<sup>2018</sup> ACA § 1311(c)(1).

<sup>2119</sup> ACA § 1311(c)(2).

<sup>2220</sup> ACA § 1311(c)(3).

<sup>2321</sup> The Impact of the ACA on Maine's Health Insurance Markets, Gorman Actuarial, LLC (May 31, 2011).

<sup>2422</sup> 24-A MRSA Chapter 54-A.

The Advisory Committee believes that the State has already adopted measures to limit increases in premiums in the individual insurance market through the adoption of its reinsurance program that will become effective in 2012. The effectiveness of the reinsurance program should be evaluated before additional measures, such as merging the risk pools, are implemented. Accordingly, the Advisory Committee recommends against merging the individual and small group risk pools.

Beginning in 2016, ACA requires the small group market to be expanded from employers who employ up to 50 employees to employers who employ up to 100 employees.<sup>2523</sup> For similar reasons, the Advisory Committee does not recommend expanding the small group market to include employers with 51 to 100 employees before 2016.<sup>2624</sup>

2. The Advisory Committee recommends that any decision to allow large group health insurance plans to participate in the Exchange be made closer to 2017.

Beginning in 2017, the State may allow issuers of large group health insurance to participate in the Exchange, at which time large employers-- *i.e.*, employers who employ an average of at least 101 employees-- would be eligible to purchase coverage for their employees through the Exchange.<sup>2725</sup>

The Advisory Committee expects the insurance market to undergo several changes between now and 2017. In particular, the individual and small group insurance markets will be subject to new rating requirements and starting in 2016, the small group market must be expanded to include employers who have up to 100 employees. Moreover, reinsurance programs under both state and federal laws will impact the individual insurance market.

Accordingly, the Advisory Committee recommends that the State evaluate whether to allow larger employers to participate in the Exchange at a later date after premiums in the insurance markets have adjusted to reflect changes in the law.

3. The Advisory Committee recommends that the Exchange and the Department of Health and Human Services evaluate whether the State should provide a basic health program.

The Affordable Care Act allows the State to establish one or more basic health programs to provide health coverage to low-income individuals instead of offering those individuals coverage

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<sup>2523</sup> ACA § 1304(b)(2) and (b)(3).

<sup>2624</sup> Federal proposed rules published at 76 Fed. Reg. 41866 (July 15, 2011) propose that in determining the size of an employer, part-time and seasonal employees must be counted and sole proprietors must be excluded. Part-time workers would be counted in the same manner as full-time workers while seasonal employees would be counted proportionately to the number of days they work in a year. Under Maine's existing law (24-A MRSA § 2808-B), full-time employees and sole-proprietors are counted, but seasonal and part-time workers are not. The Advisory Committee understands that the U.S. Department of Health and Human Services has received several comments from states objecting to the proposed method of counting employees for purposes of determining whether an employer is a small employer. Accordingly, the suggested legislation reflects the Advisory Committee's recommendation that Maine's statutory provisions apply unless and until a Federal regulation is finalized that is contrary to and preempts Maine's statute.

<sup>2725</sup> ACA § 1312(f)(2)(B).

through the Exchange.<sup>2826</sup> Individuals eligible to participate in a basic health program are those who are not eligible for Medicaid and who have household incomes that exceed 133 percent but do not exceed 200 percent of the federal poverty level.<sup>2927</sup> The Federal Government would provide financial support for the operation of a basic health ~~programs~~program. This financial support would equal 95 percent of premium tax credits and cost-sharing reductions that would have been provided to individuals if they were covered through the Exchange, but who are instead covered through the basic health program.<sup>3028</sup>

States are considering establishing a basic health plan to provide individuals who are most likely to churn between Medicaid and the Exchange with a less dramatic transition between Medicaid and the Exchange. The basic health program would provide benefits, including provider networks, that are similar to Medicaid so that these individuals can maintain coverage that is similar to Medicaid until they reach higher, more stable, income levels that would support purchasing coverage through the Exchange for a more sustained period of time. The federal funding for the basic health program may be more advantageous to the State than covering higher-income individuals in Medicaid or having them cycle in and out of Medicaid.

The Advisory Committee recommends that the Exchange and the Department of Health and Human Services evaluate whether a basic health program would be in the best interests of the State and its citizens and make a recommendation to the Legislature regarding the same.

4. The Advisory Committee recommends against establishing a regional exchange at this time.

The ACA permits states to establish a regional or interstate exchange, subject to the approval of the United States Department of Health and Human Services.<sup>3129</sup> The Advisory Committee recommends against establishing a regional exchange at this time. However, the state should monitor how other states are implementing ACA's requirements and seek opportunities for the Exchange to perform its functions more efficiently by collaborating with other states.

5. The Advisory Committee recommends that the State, and not the Federal Government, establish and maintain an Exchange.

The ACA provides that if a state fails to establish an exchange, the federal government will establish and operate an exchange within the state.<sup>3230</sup> The Advisory Committee recommends that the State establish the Exchange to retain control over, and accountability for, its operations.

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<sup>2826</sup> ACA § 1331.

<sup>2927</sup> ACA § 1331(e).

<sup>3028</sup> ACA § 1331(d)(3).

<sup>31</sup> ~~ACA~~<sup>29</sup> ACA § 1311(f).

<sup>3230</sup> ACA § 1321(c)(1).

6. The Advisory Committee recommends that the Exchange leverage existing State infrastructure. [See Appendix C.](#)

~~The Advisory Committee reviewed the following chart showing the functions that the Exchange is required to perform under federal law, and the State agencies that currently perform (or would have the capability to perform) these functions:~~



## Current State Infrastructure<sup>31</sup>

## Appendix C

| Required Functions of an Exchange  | Citation                               | DHA               | HHS | BOI | State Employee Plan |
|--|--|-------------------|-----|-----|---------------------|
| <b>Eligibility and Enrollment</b>  |  |                   |     |     |                     |
| - Determine Medicaid and CHIP  | ACA §§ 1311(d)(4)(F), 1413             |                   | X   |     |                     |
| - Determine subsidies for Private Insurance                                      | ACA §§ 1311(d)(4)(F), 1413             | X                 |     |     |                     |
| - Determine Affordability Exemption  | ACA § 1311(d)(4)(H)                    |                   |     |     |                     |
| - Determine Employer Eligibility   | Prop. 45 CFR § 155.715.                | X                 |     |     |                     |
| - Provide for open enrollment periods  | ACA § 1311(c)(6)                       | X                 |     |     | X                   |
| <b>Benefit and Plan Interaction</b>  |  |                   |     |     |                     |
| - Standardize benefit categories by actuarial value                              | ACA § 1301(d)(1)                       | X <sup>3332</sup> |     |     |                     |
| - Certify Qualified Health Plans   | ACA §§ 1311(d)(4)(A), 1301, 1301(d)(1) | X                 |     | X   |                     |
| - Reward quality through market based incentives                                 | ACA § 1311(g)                          | X <sup>3433</sup> |     |     | X                   |
| - Assign quality rating to plans   | ACA § 1311(c)(6)                       |                   |     |     | X                   |
| - Post enrollee satisfaction survey results                                      | ACA § 1311(c)(4)                       | X                 |     |     |                     |
| - Conduct risk adjustment (if state does not establish, federal government will) | ACA § 1343, Prop. 45 CFR § 153.310     |                   |     |     |                     |
| <b>Customer Service</b>  |  |                   |     |     |                     |
| - Operation of a toll-free hotline   | ACA § 1311(d)(4)(B)                    | X                 | X   |     |                     |
| - Enroll individuals   | ACA §§ 1311(d)(4)(F), 1413             | X                 | X   |     | X                   |
| - Enroll businesses  | ACA § 1311(b)(1)(B)                    | X                 |     |     |                     |
| - Maintain website with cost and quality information                             | ACA § 1311(d)(4)(C)                    | X                 |     | X   | X                   |
| - Provide cost calculator  | ACA § 1311(d)(4)(G)                    | X                 |     |     |                     |
| <b>Premium Payment and Collection</b>  |  |                   |     |     |                     |
| - Establish and manage navigator program   | ACA § 1311(d)(4)(K)                    |                   |     |     |                     |
| - Pay premiums to carriers   | Prop. 45 CFR §§ 155.240, 155.705(b)(4) | X                 |     |     | X                   |
| - Aggregate premium from multiple sources  | Prop. 45 CFR §§ 155.240, 155.705(b)(4) | X                 |     |     |                     |

~~The Advisory Committee agreed that it is important for the State to leverage existing infrastructure, employees, and assets to establish and operate the Exchange. The members of the Advisory Committee also recognized that the Dirigo Health Agency would no longer function after December 31, 2013, except to the extent necessary to wind down its operations. However, the Advisory Committee concluded that the decision as to the extent to which the employees and assets of Dirigo should be transferred to the Exchange should be determined by the Board. For~~

<sup>31</sup> An earlier version of this chart was prepared for the Advisory Council on Health Systems Development (“ACHSD”) by DHA in consultation with the DHHS, BOL, and staff of the state employee plan. The chart was included in the JSC Report and ACHSD report to the Legislature. The chart has been modified primarily to include citations to the relevant provisions of ACA.

<sup>3332</sup> Agency has experience in procurement and plan design based on actuarial value.

<sup>3433</sup> The Maine Quality Forum provides tools to the market to assist them with rewarding quality through market based incentives.



~~the same reason, the Advisory Committee did not make a recommendation as to the transfer of the Maine Quality Forum to the Exchange.~~

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| PLEASE NOTE: Legislative Information <b>cannot</b> perform research, provide legal advice, or interpret Maine law. For legal assistance, please contact a qualified attorney. |
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## **Resolve, Creating the Advisory Committee on Maine's Health Insurance Exchange**

**Emergency preamble.** Whereas, acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

**Whereas,** to be eligible for health insurance exchange funding, the Federal Government requires the states to make substantial progress in the following core areas: background research; stakeholder consultation; legislative and regulatory action; governance; program integration; exchange information technology systems; financial management; oversight and program integrity; health insurance market reforms; providing assistance to individuals and small businesses, coverage appeals and complaints; and business operation; and

**Whereas,** the deadlines for applying for the next round of federal funding are September 30, 2011 and December 31, 2011; and

**Whereas,** in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore, be it

### **Sec. 1 Advisory Committee on Maine's Health Insurance Exchange established.**

**Resolved:** That the Advisory Committee on Maine's Health Insurance Exchange, referred to in this resolve as "the advisory committee," is established to develop and provide recommendations, including suggested enabling legislation, to the Governor and the Legislature for a health insurance exchange that addresses the core areas specified by the Federal Government and consider the views of the health care industry and other stakeholders; and be it further

**Sec. 2 Membership of the advisory committee. Resolved:** That the advisory committee consists of no more than 9 members appointed by the Governor, after consultation with the chairs and lead minority members of the Joint Standing Committee on Insurance and Financial Services. The Governor shall appoint members that represent the diverse interests of stakeholders related to the establishment of a health insurance exchange. The members must include representatives of key constituencies, including, but not limited to, health care providers, insurers, health insurance producers, consumers, employers with more than 50 employees, employers with 50 or fewer employees and the Board of Trustees of Dirigo Health. Prior to making appointments to the advisory committee, the Governor shall seek nominations from statewide associations representing the interests of stakeholders identified in this section and other entities as appropriate; and be it further

**Sec. 3 Chair. Resolved:** That the Governor shall appoint a chair from among the members of the advisory committee; and be it further

**Sec. 4 Duties of the advisory committee. Resolved:** That the advisory committee shall:

1. Review and consider the recommendations issued by the 124th Legislature's Joint Select Committee on Health Care Reform with respect to a health insurance exchange;

2. Consider the rules issued by the Federal Government subsequent to the passage of the Patient Protection and Affordable Care Act and their impact on the creation and operations of a health insurance exchange;

3. In an effort to create efficiencies, review the work products of other states to consider what elements of their health insurance exchange activities might be used in this State;

4. Establish technical committees or seek the advice of technical experts when necessary to execute the duties included in this resolve; and

5. Seek input from and report regularly to legislative leadership, the Joint Standing Committee on Insurance and Financial Services and the Governor's office throughout the advisory committee's deliberations; and be it further

**Sec. 5 Meetings. Resolved:** That meetings of the advisory committee must be conducted in public in accordance with the Maine Revised Statutes, Title 1, chapter 13. The advisory committee shall provide notice of its meetings to the Joint Standing Committee on Insurance and Financial Services; and be it further

**Sec. 6 Consultation with Legislature. Resolved:** That the Joint Standing Committee on Insurance and Financial Services is authorized to hold 3 meetings before the Second Regular Session of the 125th Legislature for the purpose of consulting with the advisory committee; and be it further

**Sec. 7 Staffing. Resolved:** That Dirigo Health shall provide staffing services to the advisory committee. As necessary, the Department of Professional and Financial Regulation, Bureau of Insurance; the Department of Administrative and Financial Services, Office of Information Technology; the Department of Health and Human Services; and the State Coordinator for Health Information Technology shall also provide staffing assistance to the advisory committee; and be it further

**Sec. 8 Report. Resolved:** That the advisory committee shall submit a report, including its recommendations and suggested legislation, to the Governor and the Joint Standing Committee on Insurance and Financial Services no later than September 1, 2011.

**Emergency clause.** In view of the emergency cited in the preamble, this legislation takes effect when approved.

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